



**SHER • LEFF** LLP  
LAWYERS PROTECTING WATER



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September 6, 2009

Via Email & Hand Delivery

Hon. Shira A. Scheindlin  
United States District Judge  
U.S. District Court, Southern District of New York  
500 Pearl Street  
New York, New York 10007

Re: *City of New York v. Amerada Hess, et al.*, 04 CV 3417 (SDNY)  
*In re MTBE Products Liability Litigation*, MDL 1358  
**Request for Curative Instruction re the Petroleum Marketing Practices Act**

Dear Judge Scheindlin:

The City of New York ("the City") respectfully requests that the Court issue a curative instruction in response to the following testimony by Mr. Dugan concerning the Petroleum Marketing Practices Act (the "PMPA"):

**Q. Do you recall moments ago Mr. Sher was asking you whether you could direct unbranded distributors what to tell the stations to which they delivered?**

A. That's correct, I do.

**Q. And you said no and you wanted to tell him why not and he asked you to wait. Do you remember that?**

A. Yes.

**Q. Would you now tell us why not?**

A. Yes. The Petroleum Marketing Practices Act, the federal act that directs how we -- in our relationship with our unbranded customers as well as our branded distributors as well as our dealer-operated stores, precludes that.

**Q. That's federal law which precludes it?**

A. It is.

September 4, 2009 Trial Transcript at 3676:18 – 3677:6 (attached as Exhibit 1). As discussed below, a curative instruction is necessary because the legal conclusions stated by Mr. Dugan were both erroneous and misleading.

Mr. Dugan's testimony was erroneous because the PMPA in no way precludes a refiner from telling unbranded distributors to warn customers about the environmental and health risks of components in gasoline. *See* 15 U.S.C. §§ 2801 *et seq.*. Instead, the PMPA (1) sets forth terms applicable to the termination and renewal of franchise relationships, *see* 15 U.S.C. §§ 2801, 2802, 2803, 2804, 2805, 2806, 2807, (2) provides octane disclosure requirements, *see* 15 U.S.C. §§ 2821-2824 and (3) directs the Department of Energy to conduct a study concerning the subsidization of motor fuel, 15 U.S.C. § 2841. Accordingly, Mr. Dugan's testimony that the PMPA precluded Exxon from telling unbranded distributors to warn their customers about the special risks associated with MTBE was inaccurate.

Mr. Dugan's testimony likely left the jury with the impression that federal law was the reason Exxon failed to tell the unbranded distributors to warn their customers about the special risks associated with MTBE.

The City therefore respectfully requests that the Court instruct the jury that the Court is the sole arbiter of the law and that Mr. Dugan's testimony about the PMPA was wrong and should be disregarded. The City further requests that the Court instruct the jury that federal law in no way precluded Exxon from telling unbranded distributors to warn their customers about any special risks associated with MTBE.

Respectfully submitted,

***/S/ NICHOLAS G. CAMPINS***

Nicholas G. Campins

Cc: All Counsel via LNFS & Email

# Exhibit 1

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1 UNITED STATES DISTRICT COURT  
 1 SOUTHERN DISTRICT OF NEW YORK  
 2 -----X  
 2

3 THE CITY OF NEW YORK, et al,  
 3

4 Plaintiffs,  
 4

4 -v-

04 CV 3417 (SAS)

5 EXXON MOBIL CORPORATION, et al,  
 6 Defendants.  
 6 -----X

New York, N.Y.  
 September 4, 2009  
 9:15 a.m.

9 Before:

10 HON. SHIRA A. SCHEINDLIN,  
 11

District Judge

12 APPEARANCES  
 13

14 MICHAEL A. CARDOZO  
 15 Corporation Counsel of the City of New York  
 15 Attorneys for City Plaintiffs  
 16 BY SUSAN E. AMRON  
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 21 Attorneys for Defendant Exxon Mobil  
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 22 JAMES PARDO  
 23 WILLIAM STACK  
 23 JENNIFER KALNINS TEMPLE  
 24 ANTHONY BONGIORNO  
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1 (Trial resumed, jury present)  
 2 BARBARA MICKELSON,  
 2

3 called as a witness by the plaintiffs,  
 3

4 having been duly sworn, testified as follows:

5 THE COURT: Please state your full name, first and  
 6 last, spelling both for the record.

7 THE WITNESS: Barbara, B-A-R-B-A-R-A, Mickelson,  
 8 M-I-C-K-E-L-S-O-N.

9 MR. SHER: May I proceed, your Honor?

10 THE COURT: Please.

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2 well contaminated with MTBE would occur more frequently and  
3 would be more expensive than if the gasoline did not contain  
4 MTBE at the site, correct?  
5 A. It could.  
6 Q. And your company provided no warnings to anybody about  
7 those prospects in connection with MTBE in gasoline, correct?  
8 A. Correct.  
9 MR. SHER: I have no further questions, your Honor.  
10 THE COURT: All right. Mr. Bongiorno.  
11 MR. BONGIORNO: Thank you, your Honor. If I could, I  
12 will just swap out the notebooks.  
13 THE COURT: That is OK.  
14 CROSS-EXAMINATION  
15 BY MR. BONGIORNO:  
16 Q. Good afternoon, Mr. Dugan.  
17 A. Good afternoon.  
18 Q. Do you recall moments ago Mr. Sher was asking you whether  
19 you could direct unbranded distributors what to tell the  
20 stations to which they delivered?  
21 A. That's correct, I do.  
22 Q. And you said no and you wanted to tell him why not and he  
23 asked you to wait. Do you remember that?  
24 A. Yes.  
25 Q. Would you now tell us why not?

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Dugan - cross

1 A. Yes. The Petroleum Marketing Practices Act, the federal  
2 act that directs how we -- in our relationship with our  
3 unbranded customers as well as our branded distributors as well  
4 as our dealer-operated stores, precludes that.  
5 Q. That's federal law which precludes it?  
6 A. It is.  
7 Q. Do you also recall that Mr. Sher was asking you a series of  
8 questions about whether you provided warnings of the  
9 incremental environmental risk, and you were saying "No, nor  
10 should we have?"  
11 A. That is correct.  
12 Q. You also wanted to say why you should not have. Do you  
13 remember that?  
14 A. Yes, I do.  
15 Q. Mr. Sher asked you to wait.  
16 A. Yes.  
17 Q. So could you now tell us why you should not have?  
18 A. Our mantra, our doctrine, our philosophy, our objective at  
19 Exxon was to keep gasoline out of the environment. Whether  
20 that gasoline contained MTBE or not was not important to us.  
21 The important thing was to keep the gasoline out of the  
22 environment.  
23 And we had spent -- we put our money where our mouth  
24 was. We spent \$178 million in 1980 to '85 to upgrade all of  
25 the tanks we owned. We had an incident -- 62 leaking incidents

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Dugan - cross

1 out of a total of 7,000 stores; that's 21,000 tanks. Even with  
2 those 62 we were not satisfied. We were looking at each one of  
3 those individually to determine why they leaked, what was it  
4 that caused it, so we could take action to preclude that from  
5 occurring in the future.  
6 The key was MTBE was not causing underground storage